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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. _____

CLYDE A. PERKINS,
Petitioner,

VS.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

Clyde A. Perkins petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on November 2, 1967, and its judgment of July 11, 1968, denying rehearing.

OPINIONS BELOW

The opinion of the court of appeals is reported at 396 F. 2d 809 (App. 3a). The court's opinion denying rehearing is not yet officially reported (App. 2a). The court's opinion on motion for clarification also has not been reported (App. 1a).

JURISDICTION

The jury verdict was rendered December 20, 1963. The judgment of the court of appeals was entered November 2, 1967 (App. 3a). A petition for rehearing was denied on July 11, 1968, and a judgment on motion for clarification also was entered that same day (App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Petitioner Clyde A. Perkins—formerly one of the largest independent gasoline wholesalers and retailers in the Pacific Northwest—brought this action against Standard Oil Company of California charging that Standard violated Section 2 of the amended Clayton Act by selling gasoline at substantially lower prices to a competing wholesaler in the area and by not making available to petitioner payments, services and facilities granted to other Pacific Northwest retailers. Petitioner alleged that as a result of Standard's discriminations he was driven out of business. The jury returned a verdict in favor of petitioner, and it assessed actual damages of over \$330,000. The court of appeals set aside the entire verdict because some of petitioner's proof on the Section 2(a) aspects of his claim demonstrated (i) that the wholesaler obtaining the discriminatorily lower price, Signal Oil & Gas Company, resold the gasoline to one of its subsidiaries, Western Hyway Oil Company; (ii) that that subsidiary, in turn, resold to one of its subsidiaries, a retail marketing chain, Regal Stations Co.; and (iii) that Regal—to which the benefits of the discriminatorily lower price had been passed—precipitated a price war which adversely affected petitioner's overall wholesale and retail business. The court ruled, as a matter of law, that "Section 2(a) of the Act does not recognize a causal connection, essen-

tial to liability, between a supplier's price discrimination and the trade practices of a customer as far removed on the distributive ladder as Regal was from Standard." The question presented is:

Whether Standard's discrimination in price between competing wholesalers—which substantially lessened competition in the Pacific Northwest wholesale and retail gasoline markets—is immune from attack under Section 2(a) of the Clayton Act solely because the most direct and immediate competitive injury was felt at the retail level and, in reaching that level, Standard's gasoline was resold by the favored wholesaler to a majority-owned subsidiary which, in turn, resold again to its majority-owned retail outlets.

STATUTE INVOLVED

Section 2 of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C. § 13, provides in pertinent part as follows:

"Sec. (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:"

STATEMENT

1. Proceedings Below

On March 2, 1959, petitioner, Clyde A. Perkins, brought suit against respondent, Standard Oil Company of California (Standard), to recover treble damages for injuries resulting from Standard's price and price-related discriminations in the sale of gasoline and oil to petitioner in violation of Sections 2(a), (d) and (e) of the Clayton Act from March 2, 1955, through December 2, 1957. On December 20, 1963, after a protracted trial, the jury rendered a verdict for petitioner and assessed \$336,404.57 in damages against Standard. The court trebled the award and, after a separate hearing, allowed Perkins \$289,000 as attorneys fees for a total judgment against Standard of \$1,298,213.71.

Standard appealed to the United States Court of Appeals for the Ninth Circuit. In June 1965, oral argument was presented, and, on November 2, 1967—almost four years after the jury verdict—the court of appeals reversed the district court judgment and remanded the case for a new trial.

2. The Persons Involved

(a) *Petitioner*

Petitioner, Clyde A. Perkins, was one of the largest independent distributors of gasoline and oil in the Pacific Northwest States of Washington and Oregon (Ex. 5, 6, 21a). He started in the business in 1928 as the owner of a single service station in the State of Washington (Tr. 126-27). Over the years, Perkins acquired many more stations in Washington and Oregon (App. 4a). He also became a wholesaler in this area, having trucking equipment, operating several bulk storage plants and selling gasoline to other wholesalers,

retailers and commercial users (App. 4a; Ex. 99). From 1945 through December 1957 Perkins purchased substantially all of his gasoline from Standard, pursuant to a series of supply contracts (App. 4a; Tr. 1624-28).

In 1952 petitioner organized two corporations—Perkins Oil Company of Oregon and Perkins Oil Company of Washington—to which he transferred his gasoline and oil business and leased all of his bulk plants and most of his service stations (App. 4a; Tr. 154-74).¹ Although the corporations continued to carry on the wholesale business, they sublet most of the service stations (App. 4a-5a). The service stations not leased to the two corporations either were operated by Perkins² or leased to third parties (Tr. 173-74, 1579-81). There were approximately 60 retail stations leased or operated by petitioner, and all utilized petitioner's trade name, "Champion" (Tr. 2925).

On December 2, 1957, Perkins went out of business as a result of the damage inflicted by Standard's price and price-related discriminations; he leased the remnants of his enterprise to a major oil company, Union Oil Company of California (Ex. 1003).

(b) Standard

Standard Oil Company of California, a billion dollar corporation, was engaged in all aspects of the gasoline and oil industry; it refined crude oil, transported and stored gasoline, and sold gasoline to wholesalers, re-

¹ Petitioner brought this case on his own behalf and on behalf of the above two corporations, which had assigned their claims against Standard to him (App. 9a).

² Hereafter "Perkins" and "petitioner" include Clyde A. Perkins individually and Perkins Oil Company of Oregon and Perkins Oil Company of Washington.

tailers, commercial users and directly to the motoring public (Tr. 4914, 5630). During the period involved here, Standard had the largest share of the Pacific Northwest gasoline market (nearly 30 percent) and was the price leader in the area (Tr. 3289, 5630). Standard's principal delivery terminals in the Pacific Northwest were located at Point Wells near Seattle and Willbridge in Portland (Ex. 280B-1; 1524). In addition to Perkins, Standard sold gasoline to its Chevron and Standard dealers, who were retailers, and to wholesalers such as Signal Oil & Gas Company (Tr. 451-67, 473-81). Over the years, Perkins purchased more than 8 percent of Standard's total gallonage in the Pacific Northwest while operating only in approximately a third of this area (Ex. 2, 5, 6; Tr. 1626).

(c) Signal

Signal Oil and Gas Company (Signal) was a large, completely integrated producer and distributor of gasoline throughout the Western United States (Tr. 382-401, 763, 5447). Signal, both a supplier to and customer of Standard since the early 1930's,^a began pur-

^a Signal's relations with Standard date back to January 1932 when the companies entered into a contract under which Standard agreed to purchase crude oil and natural gasoline from Signal and, in return, to supply Signal with its refined motor gasoline requirements. This agreement was renewed for a ten-year period in 1938. Because Signal's supply of crude oil was so substantial (approximately 45,000 barrels a day in 1946) and essential to Standard's ability to meet its commitments, Signal and Standard began to renegotiate the contract in 1946.

After reaching an impasse over the price of the motor gasoline to be sold to Signal, it was agreed that Standard would purchase Signal's marketing business and facilities, including bulk plants, commission distributors, motor equipment, retail stations and trademarks. Standard reluctantly consented, also, to permit Signal

chasing from Standard at its Point Wells terminal in 1955 and at its Willbridge terminal in 1956 (Tr. 385, 5442, 5455-56). Within two years Signal had become one of Standard's largest purchasers in the Pacific Northwest (Ex. 23H). Although Signal operated as a wholesaler in the Pacific Northwest, it did not directly own any trucks or storage facilities there (Tr. 536, 4738). Signal transferred much of the gasoline it purchased from Standard to Western Hyway Oil Company (Western Hyway), and it also sold to independent jobbers (Tr. 399, 1055).

(d) Western Hyway and Regal

Western Hyway was incorporated in 1950 with Signal owning 60 percent of the stock (Tr. 399, 400, 4739). It was a trucking company without storage facilities in the Northwest (Tr. 536, 4738). The company lifted Signal's gasoline at Standard's terminals and delivered it to retailers (Tr. 416-17). Substantially all the gasoline handled by Western Hyway came from Signal (Tr. 415), and Signal treated its transfers of gasoline to Western Hyway as sales (app. 8a). Western Hyway's main customer in the Portland area was Regal Stations Co. (Regal) (Tr. 416).

Regal operated three retail outlets in the Portland area (Tr. 527-28); these outlets were opened in October 1956, December 1956, and January 1957 (Tr. 527-28). Regal competed with stations supplied and owned by Perkins (Tr. 787-793, 886-907, 644-745). Regal was in-

to re-enter the gasoline marketing business and to supply Signal's gasoline needs. This agreement was predicated on the condition that Signal increase the amount of crude oil and natural gasoline then being delivered to Standard. Throughout the period in question in this case Standard was both a purchaser from and seller to Signal. (Tr. 5444-60.)

incorporated in Oregon in 1956, and, at the time of incorporation, Western Hyway owned 55 percent of its stock (Tr. 4740). In October 1957, Western Hyway acquired 100 percent ownership of Regal (*ibid*).

(e) The Branded Dealers

Standard also sold gasoline directly to the independent operators of its Chevron and Signal* stations (hereafter referred to as Branded Dealers). These Branded Dealers operated numerous retail service stations in the Pacific Northwest and competed with petitioner's retail stations and the retail stations supplied by him (Tr. 578-80, 590, 1230).

3. The Discriminations in Their Commercial Context

(a) Standard, the largest supplier of gasoline in the Pacific Northwest, sold gasoline of like grade and quality to Perkins, Signal, and its Branded Dealers from the same bulk storage facilities at Point Wells and Willbridge (App. 6a; Tr. 1275, 1280, 1346). It is uncontested that Standard sold at lower prices to Signal than to Perkins* (Tr. 5469), and there was substantial evidence from which the jury could have found that

* The Signal stations were operated under the authorization of the Signal Oil Company, a division of Standard (Tr. 5456-57). Signal Oil Company was created out of the retail distribution system of Signal Oil & Gas purchased by Standard prior to this litigation (see fn. 3, pp. 6-7, *supra*), and during the time covered by this litigation it was not connected with Signal Oil & Gas Company.

* For over two years after this case had been filed, Standard denied any price discrimination in favor of Signal. However, on the day prior to the deposition of Signal's president, Standard admitted granting Signal rebates exceeding \$1,000,000 which it stated had previously been overlooked. A substantial portion of those rebates was directly allocable to gasoline purchased by Signal in the Pacific Northwest (Ex. 23C).

Standard also discriminated in price in favor of its Branded Dealers and against Perkins (App. 11a; Tr. 452-59, 474-75, 516, 557-58, 629-30, 1254, 5556). There also was substantial uncontroverted evidence that the Branded Dealers and the retailers purchasing Standard gasoline through Signal had received from Standard numerous other benefits which had not been made available to Perkins' retail stations or the retail stations supplied by him (Ex. 2, 106; Tr. 452-59, 474-75, 516, 557-58, 629-30, 1254, 5556). The impact of these price and price related discriminations upon Perkins' previously successful and expanding business was catastrophic: He was driven from the market within two years after Standard began supplying Signal in the Pacific Northwest (Ex. 93B, 93C, 1003; Tr. 3335, 3359-60, 3365).

(b) Standard began supplying Signal from its Point Wells terminal near Seattle in 1955, and soon thereafter Signal entered the Centralia market (in Washington) as a wholesaler (Tr. 385).^a Following Signal's entry into the Centralia market, a severe price war began, initiated by retail stations to which Signal had passed the benefits of Standard's price discrimination in its favor (Tr. 1282, 1313-16, 1341). In most profitable retail stations gasoline prices to the public are generally 6 cents per gallon over the price paid by

^a One of Signal's customers, a trucker, began making direct sales to two independent retailers (in the Centralia market) which had been regular customers of Perkins (Tr. 252, 1057, 1350, 2451, 2681, 3081-84, 3390-95, 3455; 5x. 282C-G). In an effort to retain one of the customers, petitioner reduced his margin by more than 90 percent but was still unable to beat the trucker's price (Tr. 2648). At trial, it was shown that because of Signal's discriminatorily favorable price from Standard, Signal was able to sell to the trucker at a lower price than petitioner had paid in purchasing gasoline direct from Standard (Tr. 2696-97).

the dealer (the tank truck or wholesale price) (Tr. 2855-57). During the depths of the price war in the Centralia area, however, the retail price went as low as 4 cents below the tank truck or wholesale price (Ex. 81J, K, S, T, U; 1453X, Y, AA, BB). During this price war Standard heavily subsidized its Branded Dealers in accordance with a sliding scale down to a fixed irreducible margin of $3\frac{1}{2}\text{¢}$ per gallon (later raised to $4\frac{1}{2}\text{¢}$), after which Standard absorbed any additional decrease in price (*ibid*; Ex. 1453A). Standard provided no comparable assistance to Perkins or the retailers supplied by him (Tr. 2925).

As a result, during this price war, the retail Branded Dealers often purchased gasoline from Standard at lower net prices than Perkins, who operated primarily as a wholesaler (Ex. 81J, K, S, T, U; 1453X, Y, AA, BB). Furthermore, during this period numerous other advantages extended to the Branded Dealers were not made available to the retail stations operated and supplied by petitioner. These advantages included use of Standard's credit card (worth $1\frac{3}{4}\text{¢}$ per gallon); rest room and maintenance allowances (worth $\frac{1}{4}\text{¢}$ per gallon), advertising allowances, free delivery services, free station painting, and the right to indicate they were selling major brand gasoline (worth 2¢ per gallon) (Tr. 478, 1124, 1439, 2948, 4593, 5242).

(c) In mid 1956 Standard also began supplying Signal from its Willbridge terminal in Portland (Tr. 385). Three Regal stations were opened in the Portland area shortly thereafter (Tr. 527-28). The Regal stations were supplied all their gasoline requirements by Western Hyway, which obtained the gasoline from Signal (Tr. 378, 406, 412-13). Soon after they opened the Regal stations reduced the price for gasoline below

the generally prevailing prices in the Portland area (Tr. 492-500, 507-13, 517-22). They also advertised the acceptance of major oil company credit cards and that their gasoline was a major brand (Tr. 460-61, 1443).

Regal's entry into the market broke the existing price structure and precipitated a major price war which greatly upset the whole market (Tr. 492-500, 510-11, 518-22, 605-12, 644-745, 787-93, 886-985). Petitioner introduced substantial evidence to prove that the price and price-related discriminations which Signal received from Standard and passed on to its subsidiary Western Hyway and then to Regal, Western Hyway's subsidiary, enabled Regal to break the market (*ibid.*).

The effects of Regal's entry into the market were far-reaching, going beyond the diversion of business from retail stations supplied by petitioner. There was substantial evidence that the price war precipitated by Regal spread throughout much of the Pacific Northwest (Tr. 902-08). Standard subsidized Branded Dealers located in areas many miles distant from Portland, in order to enable them to respond to the sharp price downturn caused by Regal (Tr. 556-58, 629-33). Again, of course, no comparable price or price-related assistance was made available to Perkins (Tr. 997-98).

(d) All aspects of petitioner's business were drastically affected by Standard's price and price-related discriminations in favor of Signal and its Branded Dealers in the Pacific Northwest. Prior to 1955 petitioner had enjoyed growth and financial success in his business; after Standard began discriminating in favor of Signal and its Branded Dealers, Perkins' gasoline volume and profits decreased dramatically (Ex. 93B, 93D). No less dramatic was the decline in petitioner's

fuel oil sales and income from his leased stations (Ex. 82M, 93). For example, petitioner sold approximately 4.4 million gallons of fuel oil in 1955, 3.6 million gallons in 1956 and only 2.4 million gallons in 1957 (Ex. 93C).

These declines were caused by Standard's price discriminations in favor of Signal and its Branded Dealers which occasioned many customers to cease purchasing gasoline from customers supplied by petitioner (Tr. 644-745). A number of witnesses testified that when a customer was lost for gasoline purchases, he almost invariably was lost as a fuel oil customer shortly thereafter (Tr. 3037-79, 3538, 3572).

Despite the price and price-related discriminations in favor of Signal and the Branded Dealers, for over two years petitioner struggled to continue as a viable independent distributor of gasoline. By December 1957, however, Standard's predatory discriminations had taken their toll. Perkins was forced to lease to a major oil company the remnants of a business it had taken 30 years to build—and one of the largest independent distributors of gasoline was effectively eliminated from the Pacific Northwest gasoline market (Ex. 1003).

4. The Judgments Below

After hearing this evidence and properly being instructed by the trial judge, the jury returned a verdict in favor of petitioner, assessing actual damages in the amount of \$336,404.57. Pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, the trial judge trebled the jury award, and, after a separate hearing, awarded attorneys fees in the amount of \$289,000 for a total judgment against Standard of \$1,298,213.71 (App. 4a).

The court of appeals reversed and remanded the case for a new trial. The court apparently agreed that Standard's price and price-related discriminations in favor of its Branded Dealers violated Section 2 of the Clayton Act and that petitioner could properly recover damages caused by such discriminations (App. 11a). The court also acknowledged that the evidence proved that the impact of Regal's price-cutting policy—supported by Standard's discriminations in favor of Signal—"adversely affected both the wholesale and retail business carried on by Perkins" (App. 8a). The entire jury verdict was set aside, however, because in the view of the Ninth Circuit, Section 2(a) of the Clayton Act, as a matter of law, "does not recognize a causal connection, essential to liability, between a supplier's price discrimination and the trade practices of a customer as far removed on the distributive ladder as Regal was from Standard" (App. 15a).⁷

REASONS FOR GRANTING THE WRIT

This case presents a novel question of major significance in the interpretation of Section 2 of the amended Clayton Act, 15 U.S.C. § 13(a). The jury awarded petitioner Clyde A. Perkins—formerly one of the largest independent gasoline wholesalers and re-

⁷ After reversing the judgment on the grounds discussed above, the court observed that "[i]nasmuch as the case must be returned to the District Court and tried anew, we believe it appropriate to briefly comment upon several of Standard's remaining points" (App. 8a). In the following part of its opinion the court indicated that the trial judge had erred in some rulings on the computation of damages. If this Court grants the petition for a writ of certiorari we propose to argue that the court of appeals erred insofar as those rulings were adverse to Perkins and that this Court should therefore reinstate the entire verdict, unless the Court limits the grant of certiorari to the question discussed herein.

tailers in the Pacific Northwest—substantial damages for injury to his business caused by Standard's price and price-related discriminations in favor of a competing wholesaler, Signal Oil & Gas Company, and others. The Ninth Circuit set aside the entire verdict, holding as a matter of law that Standard's discriminatory pricing policy involving Signal, Western Hyway and Regal was not actionable under Section 2(a).

In reaching that result, the court made no mention of the Act's purpose to prevent large buyers from gaining discriminatory price advantages over their smaller rivals. Nor did the court assign any weight to the fact that Standard's price discrimination had caused a substantial lessening of competition in the Pacific Northwest wholesale and retail gasoline markets, driving out of business one of the area's largest independents. Rather, impressed with the form of the transaction, the court ruled that the verdict in favor of Perkins must be set aside solely because the favored purchaser (Signal) did not resell the gasoline directly to its retail customers (Regal), but instead resold to its subsidiary (Western Hyway) which, in turn, resold to its subsidiary, the Regal retail outlets. The court reasoned that "Regal was not a customer of a customer within the purview of Section 2(a) of the Act" (App. 7a, fn. omitted), and that:

"Section 2(a) of the Act does not recognize a causal connection, essential to liability, between a supplier's price discrimination and the trade practices of a customer as far removed on the distributive ladder as Regal was from Standard." [App. 15a.]

The decision of the Ninth Circuit, if permitted to stand, will set an arbitrary and economically unreal-

istic limitation on the power of Section 2(a) to prevent price discriminations which tend "substantially to lessen competition . . . in any line of commerce." Moreover, by basing that limitation exclusively on the number of persons in the distributive chain established by the favored purchaser, the decision will enable the powerful buyers to insure that suppliers which grant them favorable price concessions will be able to avoid the sanctions of the Clayton Act. The ease with which the court's ruling could be utilized to subvert the purposes of Section 2(a) is well illustrated by the facts of this case where Signal's customer, Western Hyway, was a majority-owned subsidiary of the favored purchaser, and the Regal retail outlets were a majority-owned subsidiary of Western Hyway.⁸

It is critically important that large buyers (and sellers) be denied this easy means of destroying the competition. Section 2 of the Clayton Act is designed to protect, particularly in the petroleum industry where, in the words of Chairman Dixon of the Federal Trade Commission—

"the 'independent'—including the independent refiner, the independent jobber and the independent retailer—has, as the saying goes, one foot in the grave and the other on a banana peel." [quoted in Wilson, *Recent Developments Affecting Independent Businessmen in the Oil Industry*, 9 Antit. Bull. 559, 562 (1964).]

We demonstrate below that the decision of the court of appeals is incorrect on several grounds. First—accepting *arguendo* the Ninth Circuit's conclusion

⁸ Operation through subsidiaries is common in the petroleum industry (Tr. 3169, 4780, 4954). Standard presently has over 100; Signal (now called Signal Industries, Inc.) has over 45. Moody's Industrial Manual, pp. 2126-27, 2496-97 (July, 1968).

that this case involves so-called "fourth line" injury not cognizable under the Robinson-Patman amendments to Section 2 of the Clayton Act—it is clear that under the original Section 2 standard, which was not altered by those amendments, the jury could properly have found that the effect of Standard's price discrimination was "substantially to lessen competition . . . in any line of commerce," i.e., the wholesale and retail marketing of gasoline in the Pacific Northwest (pp. 17-24, *infra*). Secondly, the court erred in concluding that this case involved fourth line injury. Since Perkins and Signal were competing wholesalers, the effect of the price discrimination against Perkins could properly have been found by the jury to "injure, destroy, or prevent competition with any person [Signal] who . . . knowingly receives the benefit of such discrimination"—a traditional example of second line injury (pp. 24-25, *infra*).⁹

(1) Any price discrimination covered by Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,¹⁰ is prohibited if its effect may be—

"[a] substantially to lessen competition or to tend to create a monopoly in any line of commerce

or

"[b] to injure, destroy, or prevent competition with any person

⁹ In every realistic sense Perkins and Signal also were competitors on the retail level, because Signal, through its ownership of Western Hyway, had the power to control Western's subsidiary, Regal (App. 8a, fn. 6). See pp. 25-27, *infra*.

¹⁰ There are no questions in this case that both Perkins and Signal were "purchasers" from Standard; that they purchased gasoline "of like grade and quality"; and that the pertinent transactions occurred "in-commerce" (Tr. 6338).

- (1) who either grants or
- (2) knowingly receives the benefit of such discrimination, or
- (3) with customers of either of them."

The statute thus contains two distinct and independent tests of illegality. The first, [a] above, the original Section 2 standard, focuses on the overall "line of commerce" in which the competitive injury is felt. The second, [b] above, the Robinson-Patman amendments, focuses on the specific competitors injured by the price discrimination. See generally, Rowe, *Price Discrimination Under the Robinson-Patman Act* 114-23 (1962).

The Ninth Circuit in the decision below completely ignored the original Clayton Act standard;¹¹ it discussed only the language of the Robinson-Patman amendments. The district court, however, had correctly charged the jury that it could return a verdict against Standard if it found that the effect of Standard's price discrimination "may have been to substantially lessen competition . . . in any line of commerce . . ." (e.g., Tr. 6354-55.) The court of appeals erred in failing to uphold the jury verdict on that ground.

While this Court has never decided the precise issue presented here, its ruling in *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929), decided prior to the Robinson-Patman amendments, strongly supports the jury verdict against Standard. In *Van Camp*, a purchaser from the defendant sued to enjoin price discriminations against it in violation of the

¹¹ Indeed, Section 2(a) as set forth in the court's opinion omitted entirely the "in any line of commerce" language (see App. 6a, fn. 3).

original Section 2 of the Clayton Act. The defendant argued that its price discriminations could not be challenged by a purchaser because the statutory words "in any line of commerce" "must be confined to the particular line of commerce in which the discriminator is engaged, and that they do not include a different line of commerce in which purchasers from the discriminator are engaged in competition with one another." 278 U.S., at 253.

This Court flatly rejected that argument, ruling that the action came—

"within the terms of the statute, unless the words 'in any line of commerce' are to be given a narrower meaning than a literal reading of them conveys. The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." [*Ibid.*, emphasis in original.]

Continuing, the Court observed that adoption of defendant's argument would lead to a result at variance with "[t]he fundamental policy of the legislation"—

"[t]hat, in respect of persons engaged in the same line of interstate commerce, competition is desirable and that whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil. Offense against this policy, by a discrimination in prices exacted by the seller from different purchasers of similar goods, is no less clear when it produces the evil in respect of the line of commerce in which they are engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged. In either case, a restraint is put upon 'the freedom of competition in the channels of interstate trade

which it has been the purpose of all the antitrust acts to maintain.' " [*Id.*, at 254, emphasis added.]


The same reasoning necessitates a reversal of the court of appeals' decision below. That decision would limit unduly the coverage of Section 2(a), excluding from its reach price discriminations whose demonstrably anticompetitive effects do not occur above a predetermined point in the favored purchaser's chain of distribution. Nothing in the original Section 2(a) language supports such a restrictive interpretation. On the contrary, "[i]n using the term 'line of commerce' Congress evidently was referring to *lines of goods* rather than levels of competition." Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* (2d Rev. Ed. 1959) 7 (emphasis added). See also, Edwards, *The Price Discrimination Law* 7 (1959) ("Subsequent to this decision [*Van Camp*] the statute applied to all discriminations that had the prohibited anticompetitive effect, no matter where that effect became apparent.").

Effectuation of the Act's broad remedial purpose requires, in this case no less than in *Van Camp*, that the "in any line of commerce" language be defined to prohibit a lessening of competition in any commercially significant product and geographic market—regardless of whether the favored purchaser is able to structure its distribution system so that the most direct and immediate competitive injury occurs two persons below it. While such evidence may be pertinent in determining whether, *as a matter of fact*, the competitive injury was proximately caused by the price discrimination, it should not be permitted to exonerate from liability, *as a matter of law*, a supplier

whose price discrimination has been proved to cause the requisite competitive injury.¹²

On the facts of this case there can be no question that the jury properly could have concluded that the retailing and wholesaling of gasoline in the Pacific Northwest was a commercially significant line of commerce in which it was appropriate to test the anticompetitive impact of Standard's price discrimination. And the jury likewise could properly have concluded that competition was substantially lessened when one of the area's largest independents was driven out of business and supplanted by one of the majors. This is particularly true since the price discriminations which caused the independent's demise were granted by Standard—the most powerful supplier in the Pacific Northwest, furnishing nearly 30 percent of the area's gasoline gallonage (Tr. 3289); the price discriminations were continued for over 2½ years until Perkins went out of business; and they were granted in circumstances where Standard had every reason to know that Signal would pass along to Regal

¹² Our interpretation of the "in any line of commerce" language not only is in accord with the objectives of Section 2 of the Clayton Act as stated in *Van Camp, supra*; it also is consistent with the uniform judicial interpretation of the same language in Section 3 and Section 7 of the Act. *Standard Oil of California and Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *United States v. duPont & Co.*, 353 U.S. 586, 594 fn. 13 (1957). Indeed, in the landmark decision in the *duPont-General Motors* case, this Court expressly relied upon *Van Camp* as support for its ruling that appraisal of the pertinent line of commerce in a merger action cannot be limited by a *priori* rules of inclusion and exclusion.



those discriminatory price advantages in order to injure Perkins.¹³

The 1936 Robinson-Patman amendments to Section 2 of the Clayton Act do not provide a rationale for the Ninth Circuit's decision. On the contrary, they lend strong support to our argument. The amendments provide that any price discrimination is unlawful if it injures, destroys or prevents competition with the discriminating supplier, the favored purchaser or the customers of either (see [b], p. 17, *supra*).

The amendments "were motivated principally by congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores. However, the legislative history of those amendment leaves no doubt that Congress was intent upon strengthening the Clayton Act provisions, not weakening them. . . ." Cf. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-44 (1960) (fn. omitted) (emphasis added). Congress sought to achieve this strengthening by lowering the standard of proof of a violation. As the Report of the Senate Judiciary Committee emphasized, the original Section 2 of the Clayton Act—

"has in practice been too restrictive, in requiring a showing of general injury to competitive

¹³ For example, the record reflects a conversation between two Standard officials in which the following observation was made (Tr. 353):

"'You have the authority to do it and I want you to stop Regal from going to the Northwest because, if they do, they will wreck that market because they have got a better price than either Clyde [Perkins] or my other jobbers have up there, and if they come up there, they will do the same thing they have done other places. They will wreck that market'."

The Standard official to whom that observation was directed was the man responsible for supplying gasoline to Signal.

conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower."¹⁴

Thus, under the Robinson-Patman amendments a violation may be premised on proof of substantial injury to specific competitors of the favored purchaser or its customers. Where such second or third line injury is present, no substantial lessening of competition in an entire "line of commerce" need be shown. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948). For

¹⁴ S. Rep. No. 1502, 74th Cong., 2d Sess., p. 4 (1936). That sentiment was echoed in H. Rep. No. 2287, 74th Cong., 2d Sess., p. 8 (1936), and on the floor by Representative Utterback (80 Cong. Rec. 9417 (1936) (emphasis added):

"The discriminations prohibited by this bill are those whose effect may be:

1. Substantially to lessen competition in any line of commerce; or,
2. To tend to create a monopoly in any line of commerce; or,
3. To injure, destroy, or prevent competition:
 - (a) With any person who either grants or knowingly receives the benefit of such discrimination; or,
 - (b) With customers of either of them (i.e., the grantor or grantee).

Effects nos. 1 and 2 above correspond to those required to be shown under the old section 2 of the Clayton Act. Generally speaking, they require a showing of effect upon *competitive conditions generally in the line of commerce and market territory concerned*, as distinguished from the effect of the discrimination upon *immediate competition with the grantor or grantee.*"

this reason, most Section 2 litigation has since been brought under the Robinson-Patman amendments.¹⁵

Nothing in the language of those amendments, their legislative history and subsequent enforcement policy, however, justifies the Ninth Circuit's holding that petitioner's proof, which satisfied the stricter standard of the original Section 2, provides no basis for a cause of action. Congress manifestly did not intend its loophole closing amendments to convolute the entire statutory scheme, in effect reading out of the Act the original Section 2 provision. See fn. 14, p. 22, *supra*.

While Congress apparently did not consider it necessary to apply the amendments' easier standard of proof to competitive injury at the so-called fourth line, it surely gave no indication that it intended thereby to preclude all causes of action premised on such injury. Indeed, by leaving untouched the original Section 2 language, Congress negated any such possibility. The amendments specifically cover primary line, secondary line and tertiary line injury. It is essential therefore that injury not occurring at those levels be cognizable under the original prohibition of price discriminations which may tend substantially to lessen competition "in any line of commerce," or else that language will be mere surplusage, having exactly the same scope as the

¹⁵ "There is . . . no incentive for the Commission to distinguish sharply between the two kinds of injury nor for the respondents to insist on such a distinction. Whatever type of injury can be most conveniently proved is likely to become the basis of the Commission's case. Since a showing of injury to a class of competitors is usually easier than a showing of injury to competition in the market, efficiency and economy in law enforcement suggest emphasis on the narrow concept rather than the broad one." Edwards, *The Price Discrimination Law* 540 (1959).

Robinson-Patman amendments but imposing a greater burden of proof. See, e.g., *Ex Parte Public Nat'l Bank*, 278 U.S. 101, 104 (1928).

(2) Independent of the Ninth Circuit's error in holding that Section 2 of the Clayton Act has no applicability in fourth line cases, discussed above, the court fundamentally misconceived the nature of this case in ruling that it involved fourth line injury. The district court submitted to the jury the question whether Standard's favored purchaser (Signal) and its disfavored purchaser (Perkins) were competitors (Tr. 6341-42, 6347). The jury could properly have found that they were competitors because each purchased gasoline directly from Standard; each wholesaled its gasoline in the Pacific Northwest; and the retailers served by each actively competed for the patronage of the motoring public.¹⁶ *Ingram v. Phillips Petroleum Co.*, 259 F. Supp. 176, 182 (D.N.M. 1966); *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942 (D. Conn. 1966); *McCormack v. Theo. Hamm Brewing Co.*, 1968 Trade Cases ¶ 72,404, p. 85,249 (D. Minn. 1968); see *FTC v. Morton Salt Co.*, 334 U.S. 37, 55 (1948); *Krug v. International Tel. & Tel. Co.*, 142 F. Supp. 230 (D.N.J. 1956). The case therefore provides a traditional example of a second line injury situation, in which the disfavored purchaser is injured in competition with the favored purchaser. For "[t]he retail stations . . . are the instrumentalities through which competition for this ultimate market is waged." *Standard Oil Co. and Standard Stations, Inc. v. United States*, 337 U.S. 293, 323 (1949) (Mr. Justice Jackson dissenting).

¹⁶ See the Statement pp. 9-11, *supra*.

In these circumstances, the evidence of the competitive injury caused by Regal was certainly relevant in determining the extent to which Perkins was damaged by Standard's unlawful price discriminations. For example, the less gasoline the retailers served by Perkins were able to sell, the less gasoline they purchased from Perkins (Tr. 1224-27, 3030-74), and this diminution of Perkins' sales volume constituted "damages resulting necessarily and directly and immediately from" Standard's unlawful conduct. See *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

In this case the causation question was properly submitted to the jury under Section 4 of the Clayton Act, 15 U.S.C. § 15 (Tr. 6346-50), and the jury resolved it against Standard. That verdict should have been permitted to stand. The damage provision of the Clayton Act is not concerned with functional levels or lines of competition. "[T]he controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), cert. denied, 355 U.S. 835 (1957).

(3) It is important, finally, to emphasize that Signal possessed the power to control the activities of both purchasers below it in its chain of distribution. Signal was a majority stockholder of its subsidiary, Western

Hyway, and through Western it "was in a position to exercise control over Regal," as the court of appeals acknowledged (App. 8a, fn. 6). The fact that Signal, Western and Regal were not truly independent entities underscores the importance of the arguments we have made in Points (1) and (2) above. If the Ninth Circuit's ruling is permitted to stand, Section 2(a) could be violated by large buyers and sellers almost at will, merely through the utilization of subsidiary corporations having separate identities but fully subject to the control of their parents.

Therefore, if the Ninth Circuit decision is not reversed on the grounds urged in Points (1) and (2), it would be important for this Court to reverse the court of appeals' ruling that the actions of Regal were not attributable to Signal because Signal did not exercise its power to control Regal. A reversal on that ground, while not fully obviating the destructive consequences of the Ninth Circuit's decision, would at least make it more difficult for large buyers and sellers to utilize price discriminations to competitively injure persons like Perkins without running afoul of Section 2(a).

That Signal may not have chosen to exercise to the hilt its power fully to control Western Hyway and Regal is not significant in deciding the issue presented here,¹⁷ although it may be significant in other situa-

¹⁷ It is significant that Signal (as well as Standard) ignored the subsidiaries' separate corporate identities when it was useful to do so, treating, for example, an offer by Union Oil Company to sell gasoline at a reduced price to Western Hyway as an offer directly to Signal (Ex. 1707).

tions. *National Lead Co. v. FTC*, 227 F. 2d 825 (7th Cir. 1955), reversed on other grounds, 352 U.S. 419 (1957).¹⁸ The price discrimination was granted by Standard to Signal. Whether Regal did or did not have the pricing flexibility to injure retailers served by Perkins depended solely upon whether Signal itself decided to transmit to Regal the benefits of Standard's price advantage. Standard was well aware of Signal's capabilities and likely action in this regard (see fn. 13, p. 21, *supra*). Therefore, since Signal decided to do all that was necessary to drive Perkins out of business, Standard should not be able to escape the consequences of its price discriminations merely because Signal did not go farther and exercise in other respects its power to control the operations of Regal.

¹⁸ In *National Lead* the court, after finding a violation of § 2(a) by the subsidiary-seller, refused to hold the parent responsible for the violation absent a showing of an actual exercise of control by the parent over the acts of the subsidiary. Here, the issue is whether a favored buyer can immunize price discriminations from the proscriptions of § 2 of the Clayton Act through the utilization of subsidiaries which it has the power to control. To the extent that the requirement of an actual exercise of control as set forth in *National Lead* should have any applicability, it must be limited to the assigning of responsibility for violations of the law and should not be employed in determining whether a violation of § 2 of the Clayton Act has, in fact, occurred.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EARL W. KINTNER
GEORGE R. KUCIK
THOMAS P. MEEHAN
STEPHEN S. MAYNE
1815 H Street, N.W.
Washington, D.C. 20006

ROGER TILBURY
1110 Standard Plaza Building
Portland, Oregon 97204

ERNEST BONYHADI
BRUCE M. HALL
1400 Public Service Building
Portland, Oregon 97204

Counsel for Petitioner

Of Counsel:

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

RIVES & SCHWAB
1400 Public Service Building
Portland, Oregon 97204

October 1968

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,436

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

VS.

CLYDE A. PERKINS, *Appellee.*

[July 11, 1968]

ON MOTION FOR CLARIFICATION

Before: HAMLEY, KOELSCH and DUNIWAY, Circuit Judges.

In response to Perkins' Motion for Clarification, we make the following amendments to and of the opinion: Immediately preceding the final paragraph is inserted a new paragraph reading:

"In view of the outcome of this appeal, all questions concerning attorneys' fees shall await final disposition of the litigation in the district court or this court."

In addition, the final paragraph is amended to read:

"The judgment is reversed and the cause remanded for a new trial on both liability and damages (including the submission of additional or different evidence pertaining thereto), consistent with the views expressed in this opinion. On the matter of liability, however, since Standard has not questioned the trial court's ruling that Perkins and the Perkins corporations were purchasers within the meaning of the Clayton Act, the contention that Perkins was a consignee for commercial purposes and not a purchaser, will not be available to Standard on retrial."

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,436

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

vs.

CLYDE A. PERKINS, *Appellee.*

[July 11, 1968]

ON PETITION FOR REHEARING

Before: HAMLEY, KOELSCH and DUNIWAY, Circuit Judges.

Perkins' petition for rehearing is denied. Essentially it is nothing more than a repetition of arguments concerning assignments, which we are satisfied were all adequately considered and correctly passed upon by our written opinion. However, one particular point is not unworthy of brief current comment.

Because Perkins or the Perkins corporations operated or were interested in a few retail service stations, in addition to the wholesale distribution which comprised by far the greater part of their business, we believed it useful to point out that on retrial any recovery on their 2(d) and 2(e) claims for allowances and services proportional to any Standard made to its branded dealers on the retail level should not reflect Perkins' wholesale distribution.

The validity of our cautionary observation that under section 2(d) and its companion 2(e) a seller's obligation for such matters is limited to customers who compete with each other on the same level of distribution is in no wise weakened by the Supreme Court's recent reversal of *F.T.C. v. Fred Meyer, Inc.*, 359 F.2d 351 (9th Cir. 1966) reversed 390 S. Ct. 341 (1968), the decision upon which we relied.

To the contrary, its validity is finally confirmed and settled beyond dispute, for in *Meyer* the Court opined:

"We cannot assume without a clear indication from Congress that § 2(d) was intended to compel the supplier to pay the allowances to a reseller further up the distributive chain who might or might not pass them on to the level where the impact would be felt directly. We conclude that the most reasonable construction of § 2(d) is one which places on the supplier the responsibility for making promotional allowances available to those resellers who compete directly with the favored buyer." (p. 357).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,436

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

vs.

CLYDE A. PERKINS, *Appellee.*

[November 2, 1967]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Before: HAMLEY, KOELSCH and DUNIWAY, Circuit Judges.
KOELSCH, Circuit Judge.

Clyde A. Perkins brought this suit against the Standard Oil Company of California to recover treble damages for injuries allegedly resulting from Standard's price and price-related discriminations in the sale of gasoline and oil in violation of Section 2(a), (d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act.

At the conclusion of a protracted trial, the jury rendered its verdict for Perkins and against Standard, assessing damages in the total sum of \$336,404.57.¹

The court trebled this award and allowed Perkins \$289,000 as an attorney's fee (15 U.S.C. § 15) for a total of \$1,298,213.71. Standard has appealed.

Perkins started in the gasoline and oil business during 1938 as the proprietor of a single service station in the State of Washington. Over the years he acquired many more stations throughout that State and a number in Oregon. In addition, he became a wholesaler in this same territory. There he operated several bulk storage plants and sold gasoline to other wholesalers, to retailers, and to commercial users. In 1945 Perkins, together with two other dealers whose operations were similar to his own, entered into the first of a series of so-called "consignment supply contracts" with Standard, under which Standard sold them all the gasoline and oil which they required. None of the three was interested in the business of any other.

During 1952 Perkins organized two corporations—Perkins of Oregon and Perkins of Washington—to whom he respectively sold his gasoline and oil business and leased all his bulk plants and most of his service stations. The corporations continued to carry on a wholesale business but sublet all service stations, save for one operated

¹ The form is denominated "special verdict." In it the above sum, referred to as the amount of the "general verdict," is divided into three parts, each labeled "special verdict"; each part is allocated to a particular claim as follows: .

- | | |
|---|--------------|
| "(1) . . . on the first cause of action of Clyde Perkins individually | \$185,022.52 |
| (2) on plaintiff's second cause of action of Perkins Oil Co. of Oregon | 84,101.14 |
| (3) on plaintiff's third cause of action of Perkins Oil Co. of Washington | 67,280.91 |

by Perkins of Washington in Vancouver, Washington. Standard knew of these transactions but did not negotiate sales contracts with the corporations or terminate the existing one with Perkins. It continued to supply the gasoline and to bill Perkins.

On December 2, 1957 the Perkins businesses were sold to a major oil company and the contract with Standard was terminated.

Fifteen months later, on March 2, 1959, Perkins filed this suit. As ultimately submitted to the jury it comprised three claims: the first, that of Perkins individually; the second, that of Perkins of Oregon; and the third, that of Perkins of Washington.

Broadly stated, Perkins' contention was that throughout a period extending from March 1, 1955, through December 1957, he and the two Perkins corporations sustained injury to business and property because (a) Standard had charged the Signal Oil & Gas Co. and the operators of Standard's Chevron and Signal Service Stations (hereinafter referred to as "Branded Dealers")² less for the same grade and quality of petroleum products than Standard had charged him and the two Perkins corporations; (b) Standard had paid the Branded Dealers, but not him and the two Perkins corporations, for services and facilities furnished by the Branded Dealers in connection with the sale of Standard's products; and because (c) Standard likewise furnished said Branded Dealers valuable services not rendered to him

² This is the term applied in the trade to proprietors of retail service stations whom Standard authorized to use its brand names in their advertising.

and the two Perkins corporations.³ He did not contend that his alleged injury resulted from his inability to compete with Standard itself but rather that his injury stemmed from Standard's price favoritism to Signal and the Branded Dealers, which favoritism impaired and destroyed competition between Perkins and certain others of those who sold Standard's products.⁴

The Branded Dealers purchased gasoline and oil from Standard which they in turn sold at retail. With respect to them, Perkins' story is quickly told. Because of Standard's favoritism and discrimination they were able to and did offer lower prices and better services and facilities than Perkins in marketing at retail.

³ The relevant provisions of the Robinson-Patman Act, relied upon by Perkins, are contained in Section 2(a), (d) and (e); they make it unlawful for:

Sec. 2(a) "any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . with any person who . . . knowingly receives the benefit of such discrimination or with customers of any of them;"

Sec. 2(d) "for any person engaged in commerce to pay . . . a customer . . . for any services or facilities furnished by . . . such customer in connection with . . . the offering for sale of any products . . . sold . . . by such person unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities," and

Sec. 2(e) "for any person to discriminate in favor of one purchaser against another purchaser . . . of a commodity bought for resale . . . by . . . furnishing . . . any services . . . connected with the handling, sale, or offering for sale of such commodity not accorded to all purchasers on proportionally equal terms."

⁴ Hereinafter, the name "Perkins" includes Perkins individually and also the two Perkins corporations.

Signal Oil & Gas Co., like Standard, featured in this litigation exclusively as a supplier. It assertedly passed on to its customers a large part of the more favorable price that it received from Standard and thus enabled its customers (some of whom were retailers and others jobbers) to undersell Perkins.

Section 2(a) of the Act, in terms, limits the distributing levels on which a supplier's price discrimination will be recognized as potentially injurious to competition. These are: on the level of the supplier-seller in competition with his own customer; on the level of the supplier-seller's customers; and on the level of customers of customers of the supplier-seller.⁵

The record in this case manifests that a substantial part of the damages assessed against Standard with respect to each claim was necessarily rested upon the marketing of gasoline and oil by a corporation known as Regal Stations Company. The conclusion is also inescapable that Regal was not a customer of a customer within the purview of Section 2(a) of the Act.⁶ It follows that the detrimental

⁵ Mr. Rowe, in his book, "Price Discrimination Under the Robinson-Patman Act," severely questions the validity even of this so-called "third line injury concept" included in Sec. 2(a) of the Act. Saying "this esoteric doctrine appears of dubious validity today" (p. 196) the author argues:

1. That it is doubtful that a causal relationship can exist between the supplier's lower price to a favored customer and injury to competition by that customer's customer with a disfavored customer;
2. Additionally that the concept requires supplier's control over his customer's pricing; this can give rise to serious anti-trust problems of price control.

⁶ Regal commenced to retail gasoline and oil in Portland during the summer of 1956 and soon was operating a number of service stations there. It accompanied a well publicized entry into the market with a scale of prices well below that of other retailers and persisted in undercutting other retailers. Perkins took the position,

effect Regal exerted upon competition is not attributable to and would not support an award of damages against Standard; that the whole verdict is tainted, since the amount reflected in it by Regal's conduct cannot be ascertained; and that the judgment must be reversed and a new trial had.

Inasmuch as the case must be returned to the district court and tried anew, we believe it appropriate to briefly comment upon several of Standard's remaining points.

which he supported with substantial evidence, that "While there had been some price disturbances in the Portland area prior to Regal, these were . . . of 'brush fire' dimensions while Regal precipitated a major conflagration"; and he further adduced proof tending to show that the impact of Regal's price policy went far beyond Portland; that it precipitated and sustained a sort of chain-reaction throughout Perkins' entire marketing area, and that it adversely affected both the wholesale and retail business carried on by Perkins.

While the record shows Regal sold Standard gasoline, it also shows that Regal purchased this gasoline from Western Hyway Oil Co., which in turn had purchased it from Signal which had originally purchased from Standard. Even granting that the proof demonstrated Standard uniformly charged Signal substantially less than Perkins, and further granting that Signal likewise passed on to its customer (Hyway) this price advantage, the competition complained of was not that with Signal or Signal's customer, Hyway.

Perkins sought to bring the competition within the statutory bounds. His contention—to again quote from his brief—was that "[b]oth Western Hyway and Regal were controlled subsidiaries of S[ignal] O[il] and G[as]."

It is true that the "close community of interest" discussed in *Press Co. v. N.L.R.B.*, 118 F. 2d 937 (D.C. Cir. 1940), *cert. denied* 313 U.S. 595 (1941), existed between these three corporations: during the relevant period Signal owned 60% of the stock of Western and similarly from the outset and until October 1957, the latter corporation owned 55% of the stock of Regal. Thus Signal was in a position to exercise control over Regal. However, this

The factual issues of whether or not the two Perkins corporations, prior to the commencement of this action, had assigned their claims to Perkins and whether the assignments were valid need not be relitigated. These issues were the subject of special interrogatories which the jury answered favorably to Perkins. They involved matters that were entirely distinct and separable from the claims themselves; they appear to have been fully developed by the evidence; and they are in no way affected by the error

fact alone is not enough. In *National Lead Co. v. F.T.C.*, 227 F. 2d 825 (7th Cir. 1955), reversed on other grounds, 352 U.S. 419 (1957) a cease and desist order against the parent corporation charged with the unlawful acts of its subsidiaries was set aside. The court held that to establish substantial identity between parent and subsidiary corporation under the Robinson-Patman Act, more must be shown than the fact that the subsidiaries were wholly owned, that they were controlled by interlocking directors and officers and that their operations were closely correlated. The test was whether the parent exercised such complete control that the subsidiaries' corporate identity was a "mere fiction"—were the subsidiaries "mere tools" of the parent. Similarly in the *Press Co.* case, cited above, the D.C. Circuit—albeit in a somewhat different context—followed and applied this same basic requirement, saying "Unless, therefore, the community of interest of which we have spoken . . . is enough to wipe out and destroy the corporate structure, the Board's conclusion that Gannett Co. was equally responsible in its corporate capacity for the acts done by Press Co. in its corporate capacity cannot be sustained. Of course, it is true that Gannett Co., as owner of all the voting stock of Press Co., was in a position to dictate its action in any corporate matter, but until legislation is adopted outlawing holding companies this alone, in circumstances like these is not sufficient to annul corporate identity . . ." (page 945). See also *Baum & Blank, Inc. v. Philco Corp.*, 148 Fed. Supp. 541 (E.D. N.Y. 1957); *Kingston Dry Dock Co. v. Lake Champlain Trans. Co.*, 31 F. 2d 265, 267 (2d Cir. 1929).

In the case before us the record reveals no substantial evidence to show that Signal in fact dictated the corporate decisions of either Western or Regal. Absent such proof, Regal must be deemed a separate and autonomous entity.

which requires a reversal of the judgment.⁷ On the new trial the fact of the assignments will be deemed established.

The trial judge's ruling, that the relevant four year statute of limitations had not operated upon the assigned claims to bar Perkins' right to maintain suit on them, was correct.

We agree with Standard that if Perkins first asserted the claims on September 12, 1963 when, at the direction of the trial court he supplemented his contentions appearing in the pretrial order with the fact of the assignments, then his right to prosecute a suit on the claims had expired. The claims accrued not later than December 1957, and filing of the complaint in September 1959, would not have tolled the statute. "An amendment setting up such new . . . cause of action will not relate back to the date of the original petition, but will be governed by its own date and if the bar of the statute of limitations or a bar to the right to maintain such new cause of action has intervened, the new cause of action must fail." *Salyers v. United States*, 257 F. 255 (8th Cir. 1919). In the case last cited, the pleadings clearly disclosed that plaintiff's amendment to the complaint introduced into the suit a new claim upon which suit was barred. Here they do not. To the contrary, this record demonstrates with equal clarity that the suit from the time of its commencement included these claims. True, Perkins did not assert the claims as assigned claims, but he did make clear from the outset that he was asserting ownership of all property and property rights injuriously affected and for which he was seeking to recover damages. The supplement merely separated several claims initially improperly commingled into their component parts.

⁷ Indeed this court has previously passed on the issue. In the related case of *Standard Oil Co. v. Perkins*, 347 F. 2d 379 (9th Cir. 1965) we affirmed the trial court's denial of Standard's motion under Rule 60 (b) to set aside the judgment in that case on the grounds that the proof in this case disclosed that these same assignments upon which Perkins had relied were fraudulent and untimely.

Neither did the court err in submitting to the jury Perkins' claims based upon Standard's alleged Section 2(d) and 2(e) violations. There was some evidence that Perkins and the Perkins corporations operated some service stations and, to that extent, Standard was obliged, under those sections, to make the same proportional payments and allowances to Perkins for such items as service station rest room maintenance, painting of service stations, advertising and credit card privileges, as it did to the Branded Dealers. We perhaps should add, a seller's obligation extends only to customers who compete with each other on the same functional level of distribution. *Tri Valley Packing Ass'n. v. F.T.C.*, 329 F. 2d 694 (9th Cir. 1964). And a customer who functions both as a retailer and a wholesaler is entitled to receive proportionately equal treatment with respect to payments and services that the seller gives a competing retailer; but he is not entitled to such allowances with respect to his wholesale business as well.*

* A difference of legal opinion exists over the reach of Sec. 2(d) and 2(e) obligation. See Rowe "Price Discrimination Under the Robinson-Patman Act," 1964 Supplement, p. 89. The author, however, points out on page 396 of his original text:

"... the F.T.C. 1960 guides indicate a limitation of the supplier's obligations . . . to competing 'customers' and define 'customer' as someone who buys directly from the seller or his agent or broker. This resolution of the issue properly balances the possibility of law avoidance against the practical difficulties of computing appropriate benefits accruing to wholesalers and other intermediate distributors . . . and the burdens of conditioning all suppliers promotional campaigns at the retail level on their simultaneous subsidization of other distributors along the way."

This was the view taken by this court in *Tri-Valley* and recently reaffirmed in *F.T.C. v. Fred Meyer, Inc.*, 359 F. 2d 351 (9th Cir. 1966). We note that this precise question is presently before the Supreme Court pursuant to a grant of certiorari in the *Meyer* case at the last term. 386 U.S. 907 (1967).

Standard's assignments also concern the trial court's rulings on evidence and the giving of instructions relating to damages. A brief discussion of several is warranted.

It will be recalled that the verdict comprised three claims: the claim of Perkins individually, and that of Perkins of Oregon, and Perkins of Washington.

With respect to Perkins' own claim the court, over Standard's objection, permitted him to show on the issue of damages that the Perkins corporations did not pay him 1 (a) an agreed brokerage fee for securing their gasoline; (b) rentals on leases of service stations and other property, and (c) other indebtedness; (2) that he was unable to collect rentals for service stations leased to independent operators and (3) that the going concern value of his interest, as owner and lessor and as prime lessee and sublessee of service stations and bulk plants, substantially diminished.

We conclude: that items 1(a), (b) and (c) and 2 were not elements of injury properly the subject of damages, but that item 3 was. It follows that the rulings of the court were in part erroneous and in part right.

The problem is one of proximate cause. A person claiming damages must show that he was within the "target area" of the economy directly affected by the unlawful competitive practices, for "the rule is that one who is only *incidentally* injured by the violation of the antitrust laws—the bystander who was hit but not aimed at—cannot recover against the violator." *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358, 363 (9th Cir. 1955); *Conference of Studio Unions v. Loew's, Inc.*, 193 F. 2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

The solution is not an easy one and admittedly there exists a difference of judicial opinion as to what constitutes a direct (as distinguished from a remote or consequential)

injury to business or property within the meaning of Section 4 of the Clayton Act (15 U.S.C. § 15).

Congress Building Corp. v. Loew's, Inc., 246 F. 2d 587 (7th Cir. 1957), contains an exhaustive canvass of many cases coupled with an illuminating discussion of the matter. In that decision the Seventh Circuit, noting that "the courts have uniformly denied recovery to stockholders . . . creditors . . . and deposed officers of a corporation . . . who claimed injury as a result of alleged antitrust violations . . .," suggests as a reason that "[t]o permit individual stockholder recovery would run counter to the traditional treatment of a corporate injury that the corporation is the proper party to redress corporate wrongs. And direct recovery by the individual creditor would give him a preference over other creditors of the insolvent business and such recovery may act to thwart the policy of the bankruptcy laws. Further, the number of stockholders and creditors might produce an insurmountable problem of multiplicity of suits." (pp. 590-591). However, the court went on to hold that a non-operating owner-lessor of a motion picture theatre had a recognizable claim for damages against its lessee and a third party who had conspired together to reduce the business at the theatre. The court pointed out that such a violation might cause injury to the reversion of the owner-lessor and that such an injury was one directly suffered. This court, in *Steiner v. 20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956), upon identical facts and using much the same reasoning, reached the same conclusion. However, in *Steiner* we noted that *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (D.C. E.D. Pa.) affirmed per curiam, 211 F. 2d 405 (3d Cir. 1954), cert. denied, 348 U.S. 828, a case in which the lessor was not permitted to maintain a suit, was not factually similar "because in *Steiner* the lessee was a party to the unlawful combination, whereas in *Harrison* the lessee was not." Standard vigorously argues that the distinction is material and that the net effect of *Steiner* is that an actionable injury

can result only where a conspiracy to injure the lessor is entered into between the lessee and a third person. We disagree. In our view, while the fact that the lessee did not participate in the wrongful act might give rise to problems of apportionment of damages between lessor and lessee for their respective injuries and be urged as giving rise to multiplicity of suits, these reasons do not militate in favor of the wrongdoer. As said in *Congress Building Corp. v. Loew's, Inc., supra*, (at 594) "The problem of multiplicity of suits . . . is not similar to stockholder-creditor cases where a single entity exists to redress the wrong, for here there is no such entity. In fact, if the lessor cannot sue there will be no private redress for the defendant's wrongful acts. Furthermore, multiplicity is always present where the acts of the tortfeasor injure more than one individual."*

Many of Perkins' exhibits relating to damages treated the three Perkins businesses as one and reflected only consolidated sales, losses, etc. It was thus difficult, if not

* On the basis of this reasoning, Exhibit 93-E, a chart recapitulating rentals lost by the Perkins corporations on subleases to independent operators of service stations, should not have been admitted.

However, evidence showing a decline in gasoline sales by a lessor's tenant on the leased premises was properly admitted as tending to show injury to the lessor's interest in the leased property and the monetary amount of the injury. We note that Exhibits 82-J, L, and M contain general recitals that the computation is of the "Loss in Value of Business" and "Depreciation in going concern value. . . ." Such designations could well mislead a jury; moreover, it appears that the figures included business other than that done at service stations. A lessor has no interest in the business as such and the court should make clear the purpose for which the proof may be considered. Additionally, it appears that no foundation existed for the conclusion of Perkins' expert witness (reflected in the chart) that the sales volume of the leased stations would have progressively increased each year throughout the claim period at a specified rate over the base year but for Standard's asserted discrimination. Such an estimate is competent, but only if based upon facts which fairly permit the opinion.

impossible, for the jury to rationally determine whether a particular business had suffered injury and if so to allocate damages amongst the three of them. In addition, such a combination of components could readily create a distorted image by making it appear, contrary to the fact, that all had been injured. So far as practicable, proof of the items of damage peculiar to one claim should always be kept separate from that of another. This is particularly true in a case as factually complicated as this one. Additionally, we note a common vice inherent in all these exhibits. The computations appearing in them were predicated in whole or in part upon the premise that Perkins was unable to compete with Regal because of Standard's price discrimination. But, as pointed out earlier in this opinion, Section 2(a) of the Act does not recognize a causal connection, essential to liability, between a supplier's price discrimination and the trade practices of a customer as far removed on the distributive ladder as Regal was from Standard. On that ground alone, none of these exhibits should have been admitted into evidence.

Among the defenses urged by Standard was the one provided for in Section 2(b) of the Act (15 U.S.C. § 13(b)). That section, in a proviso, permits a discriminating seller to rebut "the prima facie case . . . by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor"

As part of its proof Standard adduced testimony from one of its officers to the effect that six months before Standard lowered its price to Signal, he was informed that a competitor, Union Oil Company, had made Signal such an offer and that Standard's reduction which followed was generated by this intelligence. The court refused as irrelevant Standard's offer of sales records from Union's files, dated several months after Standard's price reduction. Despite its *ex post facto* nature, this proof would have afforded the basis for an inference that the prices were

those offered during the critical period by Union; thus the records would have served a dual purpose as direct evidence of the Union's prices and to corroborate the testimony of Standard's witness.

Standard makes a more serious objection with reference to the court's instruction on this issue. The jury was told that to establish the affirmative defense the burden was upon Standard to prove its competitor had made "a definite offer" of which it (Standard) was aware. The instruction, standing alone, was clearly erroneous, for the Supreme Court declared in *Trade Commission v. Staley Co.*, 324 U.S. 746, 759-60 (1945) that "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. . . . We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally lower price of a competitor."¹⁰

Other assignments urged by Standard in its brief involve matters not likely to occur during the course of another trial and we therefore, in order to avoid unduly prolonging this opinion, do not discuss them. Our failure to do so, however, is not to be taken as an appellate approval of every ruling not specifically discussed herein.

The judgment is reversed and the cause remanded for a new trial consistent with the views expressed in this opinion.

¹⁰ The court also gave an instruction, requested by Standard, which correctly stated the rule.

